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**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.**

STB Docket No. AB-1071

**STEWARTSTOWN RAILROAD COMPANY
- ADVERSE ABANDONMENT -
IN YORK COUNTY, PA**

**REBUTTAL IN SUPPORT OF THE APPLICATION OF THE
ESTATE OF GEORGE M. HART FOR ABANDONMENT OF
THE STEWARTSTOWN RAILROAD COMPANY**

**ENTERED
Office of Proceedings**

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Public Record**

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September 6, 2011

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The Estate of George M. Hart (the “Estate”) hereby submits this rebuttal filing (the “Rebuttal”) in response to comments offered in reaction to the Estate’s July 7, 2011 application (the “Application”) filed pursuant to 49 U.S.C § 10903 and 49 C.F.R. Part 1152, Subpart C, to authorize the abandonment of the entire line of the Stewartstown Railroad Company (“SRC”) located in York County, PA.¹ The rail line (the “SRC Line”) that is the subject of this Application is approximately 7.4-miles in length and extends between milepost 0.0 (New Freedom, PA), and milepost 7.4 (roughly 0.2 miles east of Stewartstown, PA).

By or before the Board-prescribed August 22, 2011 deadline, several parties expressed their views on the merits of the Application, including SRC.² The Estate will address the responsive comments as appropriate herein, but observes preliminarily that, in view of the record

¹ A proceeding initiated by the filing of an application to abandon all or a portion of a non-applicant carrier’s rail line is commonly referred to as an “adverse” abandonment proceeding, because the proceeding is presumed to be contrary to the interests of the non-applicant railroad.

² On August 22, 2011, SRC filed what it entitled a “Protest/Statement of Opposition of Stewartstown Railroad Company” (the “SRC Protest”) in response to the Estate’s Application.

and pertinent precedent, the present and future public convenience and necessity ("PC&N") warrant Board approval of the abandonment that the Estate seeks.

I. BACKGROUND

In its Application, the Estate set forth the facts and circumstances that have prompted it to initiate the subject abandonment proceeding. The Estate hereby incorporates by reference the Application's background discussion. The record contains the following undisputed facts bearing on the Board's PC&N analysis:

- SRC owns the roughly 7.4-mile SRC Line located in southern York County, PA. SRC also appears to own certain appurtenant parcels of land, lineside structures (such as railroad stations), and motive power.
- The SRC Line is out of service, and is in need of rehabilitation. Neither SRC nor the Estate knows the extent of the rehabilitation that is or will be needed to return the SRC Line to service, and neither has an estimate of the cost of such rehabilitation.
- SRC freight service ended in 1992. Rail passenger excursion operations continued thereafter for roughly another 12 years.
- SRC suspended passenger excursion operations in 2004, at which time all conventional rail operations ceased.
- SRC's only outlet to the balance of the interstate rail network, including line-haul carriers such as Norfolk Southern Railway Company ("NSR"), is via track owned by York County, PA – the former Northern Central Railway line (the "NCR Line") extending from New Freedom northward to Hyde Siding, PA (roughly 3 miles south of York, PA). The NCR Line has been without freight rail service for several years. York County recently entered into an agreement with Steam Into History, Inc. ("SINTOH") to run steam-powered excursion trains on the NCR Line. SINTOH – a non-common carrier – is reportedly in the process of restoring the southern half of the NCR Line. SINTOH has no timetable for restoring the NCR Line's northern half.
- SRC repeatedly has acknowledged that it owes to the Estate a debt in the amount of \$352,415. The debt arrangement is documented by a duly recorded indenture of mortgage and a judgment note. The mortgage, dated January 5, 1996, and recorded with the York County Recorder of Deeds at book 1274, pages 4846-4855, secures the payment of \$289,702.31 (the amount owed by SRC to Mr. Hart at that time). In 2006, SRC executed and delivered to Mr. Hart a judgment note in the amount of \$352,415, which was entered as a judgment with the Prothonotary of York County at

File 96-No. 914-30. The arrangements entitle the Estate to immediate repayment of the loan amount upon demand, which demand was made on December 12, 2008.

- In 2009, in response to the Estate's demand for repayment of the loan amount, SRC's board of directors resolved to pursue the sale of SRC's rail assets.³
- On March 10, 2010, SRC proposed a 5-year repayment arrangement, which the Estate and the sole residuary beneficiary of the Estate subsequently rejected.
- SRC has identified two shippers with a purported interest in SRC freight service – Maryland Recycle Company's Pen-Mar Scrap facility ("Pen-Mar"), and Maryland & Pennsylvania Railroad Preservation Society ("Ma&PaRPS"). Pen-Mar has offered an unverified letter opposing abandonment and expressing an interest in SRC service within two years. Ma&PaRPS also expressed an interest in using the SRC Line for vaguely-described rail freight purposes.⁴

SRC claims that the SRC Line, although long out-of-service, is nevertheless important to interstate commerce. The Estate, on the other hand, has provided evidence (much of it obtained in discovery from SRC) proving otherwise. The Estate believes the track comprising the SRC Line, in whatever shape it may be, has no future as a common carrier operation, because it has no definite near-term or reliable long-term freight traffic prospects. The SRC Line's continued existence furthers no important federal interest, except for perhaps the *theoretical* possibility that one day it could again host freight traffic.

The Estate has chosen to pursue the abandonment in an effort to collect a debt owed to it (an amount that the Estate's executor is obligated to secure for the benefit of the Estate's sole residuary beneficiary, Bucks County Historical Society – "BCHS") pursuant to an agreement

³ Application, Exhibit I (Verified Statement of Herman J. Bushman, Jr.) at Attachment 3 (Resolution of Stewartstown Railroad Company to be Sold). That resolution also stated that "for all practical purposes [SRC] is insolvent." David M. Williamson, SRC's president, questions whether the language regarding SRC's "practical insolvency" was in the resolution approved by SRC's directors. SRC Protest, Verified Statement of David M Williamson ("V.S. Williamson") at 10. Mr. Williamson could have, but curiously did not, produce a copy of the subject resolution in the form in which he "asserts" it was passed.

⁴ Although not mentioned in the SRC Protest, another entity has come forward to express an interest in SRC rail service – Internet Factory, Inc. ("Internet Factory").

under which SRC has been in default for nearly three years. Were SRC a viable operation, there would have been multiple avenues by which SRC could have arranged the timely repayment of the debt (see Application at 30-32), but SRC is unable to pay its debts in a timely fashion, and has not proven itself able to repay its debts under even an extended repayment plan.

SRC has sufficient assets to satisfy its debt obligations, but it adamantly refuses to liquidate them (at least not for the benefit of the Estate), insisting that the Estate should give SRC “more time” to address its financial circumstances. For these reasons, the Estate has determined that it would be able to recover the amounts owed to it only if – (1) SRC’s assets are sold at fair market value (and for cash) to an interested person seeking to acquire these assets for continued common carrier rail use; (2) SRC’s assets are sold for non-common carrier rail uses (such as those that SINTOH has chosen to engage in on the connecting NCR Line); or (3) the SRC assets are, as a last resort, sold off in pieces and/or salvaged.

The Estate would prefer *not* to see the SRC Line salvaged, and it hopes that abandonment authorization facilitates the for-cash transfer of SRC’s assets to an entity with the resources and desire to see the SRC Line retained for railroad purposes. Accordingly, the Estate has agreed that offers of financial assistance (“OFA”) and interim trail use, if undertaken in an expedited manner that would not defraud SRC creditors, should be allowed.⁵

Because it is pertinent to SRC Line valuation issues in the event of an OFA proceeding, it is worth noting that the Estate and SRC disagree on the scope of SRC’s interest the SRC Line’s right of way. SRC’s witnesses David Williamson and Eric Bickleman insist that SRC holds the

⁵ There are circumstances under which interim trail use would be a welcome outgrowth of this abandonment process, but interim trails use is not up to the Estate. Rather that the success of such efforts depend upon SRC.

subject right-of-way in fee, based upon language they say is in the subject deeds.⁶ The Estate's regulatory counsel, on the other hand, has obtained copies of 29 separate conveyance documents, all dated 1884, by which instruments SRC appears to have assembled its right-of-way from individual landowners. Of the 29 instruments, 28 adhere to a standard form "Grant of Right of Way." The Estate's counsel forwarded these documents to the Estate's Pennsylvania counsel for examination and for a legal opinion. The Estate's Pennsylvania counsel has advised that the executed, "Grant of Right of Way" instruments most likely convey easement interests in the SRC Line's right-of-way, not fee simple interests.⁷

II. ARGUMENT

The record reflects that, for a variety of reasons, SRC lacks reliable freight traffic prospects, and that, even if there were potential freight traffic on the SRC Line, there is no evidence that such traffic can and would move at rates that would be acceptable to prospective shippers and remunerative to the railroad. Under the circumstances, preservation of the SRC Line advances no tangible federal public interest. Moreover, because granting the abandonment Application would facilitate the possible transfer of ownership of the SRC Line to another entity with an interest in preserving the property for future rail service, it is far from certain that abandonment authorization would harm any federal interest.

Granting the Estate's Application, on the other hand, would – (1) promote the honest and efficient management of SRC; (2) permit the Estate to pursue its remedies at state law related to SRC's default on its debt obligations; and (3) enable the executor of the Estate to fulfill his legal duties to collect amounts owned the Estate promptly in an effort to conclude the Estate without

⁶ See SRC Protest, V.S. Williamson at 13-14, and Verified Statement of Eric J. Bickleman ("Bickleman V.S.") at unnumbered page 5.

⁷ The Estate is willing at the appropriate time to share this legal concerning the SRC Line right-of-way conveyances with prospective OFA offerors and with SRC.

delay. For these reasons, as is discussed below, the facts militate in favor of a determination that the PC&N permit abandonment of the SRC Line.

A. Preliminary Matter: The Subject Adverse Abandonment is Properly Before the Board

SRC asks “as a threshold matter, . . . whether the Board is, in fact, the proper body before which to bring this matter.” In so doing, SRC claims that “the present dispute over the Hart lien is a private matter that would be best resolved in a civil court proceeding.”⁸

Would that SRC were correct, but, unfortunately, it isn’t. If the Estate’s enforcement of its rights under the Hart lien could be carried out exclusively in Pennsylvania civil court, then the Estate could have dispensed with the rigors of an abandonment, and would be well on its way to foreclosing on SRC’s assets. In fact, the Estate would probably be concluded by now, and the future of the SRC Line would most likely be resolved. But the Estate knows better, and recognizes that the disposition of rail assets that are presumed to be part of the interstate rail network is unquestionably a matter subject to the Board’s exclusive jurisdiction.

For authority on this issue, the parties need not look any further than the Board’s recent decision in an Escanaba & Lake Superior Railroad Company (“ELS”) abandonment proceeding in which ELS sought to abandon and liquidate a portion of its railroad to repay a debt on which the railroad had defaulted. The creditor had threatened on multiple occasions to foreclose upon the railroad in the absence of an STB proceeding, and seize the carrier’s rail assets. In direct response to the creditor’s threatened actions, the Board stated as follows:

Regarding [the creditor’s] foreclosure action involving this still-active rail line and ELS’s other rail assets, interested persons should note well-settled law that the Board has exclusive jurisdiction over transportation by rail carriers and associated property, and that the remedies provided under the statutes administered by the Board preempt the remedies provided under federal and state law if such laws unreasonably interfere with railroad

⁸ SRC Protest at 7.

operations or interstate commerce. 49 U.S.C. § 10501(b); see, e.g. Norfolk S. Ry. and the Ala. Great S. R.R.—Petition for Declaratory Order, FD 35196 (STB served March 1, 2010). See also City of Auburn v. STB, 154 F.3d 1025 (9th Cir. 1998).⁹

Accordingly, the Estate cannot exercise its remedies under state law (such as assuming control of SRC's rail assets) until the Board lifts the "shield" of federal preemption.

B. The PC&N Standard as Applied in Adverse Abandonment Proceedings

The standard governing formal abandonment proceedings, adverse or otherwise, "is whether the present or future public and convenience and necessity ['PC&N'] require or permit the proposed abandonment."¹⁰ In applying this standard, the Board engages in a balancing of interests, considering, specifically, "whether there is a present or future public need for rail service over the line and whether that need is outweighed by other interests."¹¹

Both the Board and its predecessor, the Interstate Commerce Commission ("ICC"), have explained that the agency has exclusive jurisdiction over abandonments to protect the public from an unnecessary discontinuance, cessation, interruption, or obstruction of available rail service. While the Board may protect a rail line for continued rail service where the incumbent carrier wishes to continue operations and has taken reasonable steps to acquire traffic, the Board

⁹ Escanaba & Lake Superior Railroad Company – Abandonment Exemption – In Ontonagon and Houghton Counties, Mich., STB Docket No. AB 415 (Sub-No. 2X), slip op. at 2 (STB Served Jul. 21, 2010).

¹⁰ See, e.g., 49 U.S.C. § 10903(e); Denver & Rio Grande Railway Historical Foundation – Adverse Abandonment – In Mineral County, CO, STB Docket No. AB-1014, slip op. at 5, _ S.T.B. _ (STB served May 23, 2008) ("City of Creede"); The Western Stock Show Ass'n – Abandonment Exemption – In Denver, CO, 1 S.T.B. 113; 1996 WL 366394 (S.T.B.) at *12 (July 3, 1996) ("Western Stock Show").

¹¹ City of Creede at 5, citing New York Cross Harbor R.R. v. STB, 374 F.3d 1177, 1180 (D.C. Cir. 2004) ("New York Cross Harbor"); City of Cherokee v. ICC, 727 F.2d 748, 751 (8th Cir. 1984); Seminole Gulf Railway, L.P. – Adverse Abandonment – in Lee County, FL, STB Docket No. AB-400 (Sub-No. 4) (STB served Nov. 18, 2004) ("Seminole Gulf"); and Norfolk Southern Railway Company—Adverse Abandonment—St. Joseph County, IN, STB Docket No. AB-290 (Sub-No. 286) (STB served Feb. 14, 2008) ("St. Joseph County").

will not allow its jurisdiction to be used to shield a line from the legitimate processes of state law where no overriding federal interest exists.¹² If the Board finds that the PC&N does not require or permit continued operation over the line, a grant of the abandonment application removes the federal preemption “shield” of the agency’s jurisdiction.

The Board employs the section 10903(e) PC&N standard by weighing the interests of the carrier, the public, shippers, and others with a stake in the outcome of the proposed abandonment.¹³ In an adverse abandonment proceeding, the applicant bears the initial burden of proving that the PC&N support the proposed abandonment.¹⁴ But where the applicant has shown that the carrier has no likelihood of success in preserving the line for freight rail service (as the Estate has done here), then the burden then shifts to the carrier to prove that the line is question has realistic freight service potential.¹⁵ If the carrier cannot rebut the applicant’s evidence, then the Board may permit the abandonment of the targeted line.

The Board’s PC&N analysis requires a fact-specific, case-by-case evaluation of the facts.¹⁶ This is especially so where the Board must render a decision based upon competing

¹² City of Creede at 6, n. 15 (citing Kansas City Pub. Ser. Frgt. Operation – Exempt. – Aban., 7 I.C.C.2d 216 (1990); and CSX Corporation and CSX Transportation, Inc. – Adverse Abandonment Application – Canadian National Railway Company and Grand Trunk Western Railroad, Inc., STB Docket No. AB-31 (Sub-No. 38) (STB served Feb. 1, 2002) (“CSX – Adverse Abandonment”).

¹³ See, e.g., Western Stock Show, 1996 WL 366394, *12.

¹⁴ See, e.g., City of Creede at 13; Salt Lake City Corporation – Adverse Abandonment – In Salt Lake City, UT, STB Docket No. AB-33 (Sub-No. 183), slip op. at 5 (STB served Mar. 8, 2002) (“Salt Lake City”).

¹⁵ City of Creede at 13.

¹⁶ Paducah & Louisville Railway, Inc. – Abandonment Exemption – In McCracken County, KY, STB Docket No. AB-468 (Sub-No. 5X), slip op. at 2 (STB served Mar. 16, 2004) (“the results of the balancing test in abandonment proceedings are fact-specific”).

public interest considerations.¹⁷ The Estate and SRC agree that, under the PC&N standard, the Board must balance the interests of preserving the SRC Line against the interests of the Estate in seeking prompt repayment of a debt that SRC acknowledges that it owes. The parties disagree profoundly, however, on whether preserving the SRC Line would advance a public interest, and the extent to which the proposed abandonment would advance public and/or private interests.

C. The PC&N Requires and Permits Abandonment of the SRC Line

As the first step in its PC&N analysis, the Board undertakes a thorough and realistic assessment of the line's traffic prospects to see if there is an existing or future public need for rail service.¹⁸ The Board also assesses whether or not the railroad has taken "reasonable steps to attract traffic."¹⁹ In this case, there is no persuasive evidence to show that the SRC Line can or will ever again host freight traffic.

As a second step, the Board must determine whether or not, on balance, the Board's jurisdiction over the subject rail property is being used to shield the railroad from the legitimate processes of state law, and to thwart other public interests linked to the proposed abandonment.²⁰

¹⁷ New York City Economic Development Commission – Adverse Abandonment – New York Cross Harbor Railroad in Brooklyn, NY, STB Docket No. AB-596, slip op. at 4 (STB served Aug. 28, 2003) ("[t]he weighing of the relevant interests [in an adverse abandonment proceeding] is an inherently fact-specific process"), rev'd and remanded on other grounds sub nom. New York Cross Harbor, 374 F.3d 1177 (D.C. Cir. 2004).

¹⁸ See City of Creede at 6, and 6, n. 17 (citing Seminole Gulf; and St. Joseph County).

¹⁹ Salt Lake City at 8; Chelsea Property Owners – Abandonment – Portion of the Consolidated Rail Corp.'s West 30th Street Secondary Track in New York, NY, 8 I.C.C.2d 773, 779 (1992) ("Chelsea"), aff'd sub nom., Consolidated Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir. 1994).

²⁰ City of Creede, slip op. at 18 ("[w]e make no determination regarding the parties' property rights, which are matters of state law. This decision simply removes the shield of Federal jurisdiction so that the processes of state law may be applied") (footnote omitted); CSX – Adverse Abandonment, slip op. at 6 ("in this adverse abandonment proceeding, the primary question is whether removal of our jurisdiction as a shield against state law is in the public interest"). This step entails a balancing of the interests in preservation of a rail line (in view of its past, present, and future circumstances) against those associated with the proposed

In this case, the record is clear. The long-out-of-service SRC Line is not needed for interstate commerce. SRC-originated documents refute its own feeble claims that the railroad will again host freight traffic. Furthermore, SRC is using the Board's jurisdiction over its rail property as a means to evade its legal obligations to a creditor, and to bar the Estate from remedies otherwise available to it under Pennsylvania state law.

1. The SRC Line's rail common carrier prospects

The SRC Line has been inactive for many years. In detailed evidence set forth in the Application, much of it obtained by way of discovery, the Estate also has shown that SRC is highly unlikely to secure freight traffic in the future. To better grasp SRC's freight potential, the Estate requested and obtained via discovery documents (supplied pursuant to a protective order) chronicling SRC's recent, limited efforts to solicit and to secure freight traffic. In these documents, discussed in the confidential version of SRC's Application at pages 20-24 and offered as Confidential Exhibits AA and BB attached thereto, SRC recognizes that it has no freight traffic future. According to SRC-supplied documents, the only shipper with which SRC has had recent freight service discussions is Pen-Mar, but SRC's frank assessment of its inability to secure Pan-Mar traffic is detailed in these same portions of the Application.

SRC's traffic prospects are undercut by its isolation from the balance of the interstate rail network. SRC has but one rail outlet – the out-of-service NCR Line extending from a connection with SRC at New Freedom to a point of connection with York Railway Company – “York Rail” – at Hyde Siding, PA. SRC does not dispute that the NCR Line is out of service, and it has not explained when, how, and under what terms and conditions, traffic that would

abandonment. SRC argues that there is little to be balanced here, because, in its opinion, the abandonment would promote no genuine public interest. As has been and will be shown, SRC's self-serving assertion is plainly incorrect – there are considerable public interests that would be sacrificed if the Board were to deny the Estate's Application.

purportedly originate or terminate on the SRC Line would traverse the NCR Line. This critical factor is discussed later in the Rebuttal.

Has SRC taken “reasonable steps” to attract freight traffic? Probably not. SRC’s Mr. Williamson explains that the main reason that the railroad has taken few recent steps to solicit freight traffic is that SRC is effectively isolated by the status of the NCR Line. Mr. Williamson explains that with SINTOH’s recent emergence on the scene, freight traffic has suddenly become “realistic” again.²¹ But SINTOH’s ongoing efforts to reactivate the southern half of the NCR Line don’t really make SRC freight service much more realistic than before. SRC’s single token “effort” to attract freight traffic (there is only mention of “preliminary discussions” with Pen-Mar) is not genuine; it is all form and no substance.

In undertaking its PC&N analysis the Board does not simply accept at face value the targeted railroad’s claims of prospective freight traffic. Rather, the Board engages in a detailed shipper-by-shipper assessment of need for the targeted line,²² and it must do the same here. In view of the evidence the Estate has provided to demonstrate that SRC has no freight traffic prospects and to show that the SRC Line is isolated from the balance of the interstate rail network, SRC should have shown in particular detail (if it could) that it has traffic commitments, that these commitments would make freight traffic service economically feasible, and that SRC can and will overcome the obstacles associated with the out-of-service NCR Line. Specifically, SRC should have addressed all of the following (but did not):

²¹ SRC Protest, V.S. Williamson at 14 (“The Estate [asserts] . . . that SRC has ‘made little credible effort over the past few years to secure freight traffic[.]’ ***This is true***, only because the connecting Northern Central Line has been out of service”) (emphasis added).

²² See, e.g., City of Creede at 7 (the Board carefully examined the railroad’s evidence concerning prospective shippers and traffic volumes, and found that the traffic claims were too speculative to establish shipper need); Chelsea, 8 I.C.C.2d at 779-789 (the agency evaluated the railroad’s track rehabilitation and future traffic plans, determining ultimately that the railroad’s freight service plan was neither “practicable” nor “economically rational”).

- Pen-Mar as the only industry with an allegedly “definite” interest in rail service. Unchallenged evidence in the Application directly contradicts SRC’s claims that Pen-Mar is a “definite” shipper prospect. Can SRC explain how circumstances have changed to make service to Pen Mar viable?
- Precisely when will SRC be in a position to handle Pen-Mar shipments, and when, and under what circumstances would Pen-Mar commence shipping via SRC?
- Although Pen-Mar expresses interest in SRC service, it appears that it has not entered into any binding traffic commitments with SRC. Did SRC ask for, or has Pen-Mar offered to make, any traffic commitments?
- How many annual carloads would Pen-Mar ship via SRC, and from what origins and/or to what destinations?
- At what rates would Pen-Mar agree to ship traffic via SRC?
- Has Pen-Mar worked out rates for service over the NCR Line (and, if so, with whom), York Rail, and/or NSR?
- In view of Pen-Mar’s anticipated traffic levels and SRC’s rate(s), is the freight traffic economically feasible for SRC?
- What arrangements, if any, has SRC made with York County and/or SINTOH regarding “bridge” service over the NCR Line? Who will provide the freight service over the NCR Line, and pursuant to what terms and conditions?
- When will the northern half of the NCR Line be restored to service? Who will restore this portion of the NCR Line to service, and at what cost?
- Does SRC have a business plan that demonstrates that future freight traffic at anticipated rates and levels would be remunerative?

The promising future SRC envisions doesn’t comport with recent discussions by and among SRC officials as reflected in recent materials supplied to the Estate in discovery and obtained through independent means. See Application at pages 21 and 22 (and in the confidential exhibits cited therein), and SRC resolution included in the Application at Exhibit I, Attachment 3 (in which SRC states that it is “for all practical purposes . . . insolvent”). SRC has not rebutted the Estate’s evidence on this issue. The truth is that SRC has no freight shippers,

and in view of the considerable challenges it faces (and wants the Board overlook), it will in all likelihood never again have any.

2. Abandonment would promote important public interests

The record establishes that little, if any, public interest would be served by prohibiting the abandonment of the SRC Line. On the other hand, it is very clear that SRC is using the Board's jurisdiction over its rail assets as a shield to permit SRC to evade its obligations to the Estate, and to preclude the Estate from foreclosing on the SRC assets as it would otherwise be entitled to do under Pennsylvania law. Moreover, despite SRC's vociferous (but ultimately unsupported) protestations to the contrary, the abandonment would advance important public interests recognized under STB and applicable state law.

To appreciate the public interest considerations that militate in favor of abandonment, the Estate's collection efforts against SRC must be put into proper perspective. First, the Estate is owed a considerable sum, representing a large portion of SRC's net salvage value, and the full amount owed is payable upon demand. The Estate issued its demand for repayment of the debt on December 12, 2008, in response to which SRC offered, and the Estate rejected, a 5-year repayment proposal.²³ To date, it has received no funds from SRC. In fact, based upon SRC financial data produced by SRC in response to discovery (see Application, Confidential Exhibit DD) and more recent experience with SRC, it appears that the railroad is, and would have been, unable to meet its commitments under its repayment plan. In addition, the Estate has evaluated SRC's existing circumstances and its future prospects as both a potential freight service provider and excursion operator, and has determined that foreclosure is the only way that the Estate can realistically hope to recoup the amounts owed to it.

²³ The Estate will address the particulars of the SRC repayment proposal later in this Rebuttal.

Without the Board's assistance or SRC's cooperation in selling or liquidating the railroad, it is unlikely that the Estate or its residual beneficiary will ever see SRC repay the debt it owes. SRC is already in default. Denial of the Estate's Application would enable SRC to remain in default, and would encourage SRC to dictate utterly hollow terms of repayment going forward, because SRC will know that yet another default would be of no legal consequence to it. It is hard to imagine how such an outcome would be consistent with the public interest.

As explained in the Application, holding railroads accountable for their debt obligations, and assuring railroad creditworthiness, are both important public interests recognized in the Rail Transportation Policy ("RTP"), specifically 49 U.S.C. § 10101(9) (encouraging the honest and efficient management of railroads). SRC need not evade its acknowledged obligation to the Estate, but it has chosen to do so, and whether it likes the appellation or not, SRC's use of the Board's "jurisdictional shield" to evade its obligation is dishonest, and must not be sanctioned.²⁴

The Estate devoted considerable attention to public interest considerations weighing in favor of abandonment at section II.C.6 (pp.29-34) of its Application (There Are Compelling Interests Advanced by Abandonment). In SRC's unsupported opinion, abandonment of the SRC Line would promote only a limited, and essentially negligible, *private* interest. SRC nowhere bothers to explain why a creditor's interest in recouping a debt in the event of default is merely "private," why debt evasion should be sanctioned under the RTP, and why facilitating railroad debt evasion is of no consequence to the Board to or to railroad-creditor relations generally. SRC avoids any discussion of the RTP and railroad-creditor relations issues presented in the

²⁴ Railroad Ventures, Inc. – Abandonment Exemption – Between Youngstown, OH, and Darlington, PA, in Mahoning and Columbiana Counties, OH, and Beaver County, PA, STB Docket No. AB-556 (Sub-No 2X), slip op. at 12, (STB served Dec. 15, 2005) (allowing a rail carrier to benefit from its inappropriate conduct is contrary to the principles of section 10101(9)).

Application, offering instead circular logic that the Estate's interest in the prompt collection of its debt is a private interest because SRC says it is.)²⁵

In addition to promoting public interest factors recognized as a matter of the RTP and Board policy, the subject abandonment also would advance the public interest under applicable state law, which recognizes that the personal representative of a decedent's estate has legally enforceable fiduciary obligations to the estate's beneficiaries, and provides that the representative must promptly collect debts owed to the estate. Specifically, under Pennsylvania law, a personal representative has a duty "to use diligent efforts to collect debts" due to the decedent.²⁶ "[A]n executor or administrator is under obligation to diligence in preparing for distribution. He cannot be justified in putting forth no efforts to collect a debt due the estate."²⁷ In fact, an executor can be held liable for his failure to make good faith efforts to collect a debt owed to the decedent. "An executor who is guilty of gross negligence in his collection of the debts due to the estate is personally liable for them, if lost through his delay in enforcing payment."²⁸ If an executor does not act as he would in a collection of a debt owed personally, then the executor acts with gross negligence and can be liable for the uncollected debt owing to

²⁵ SRC does not discuss how SRC's conduct is consistent with section 10101(9), or how the RTP does not reflect public interests. If SRC wants to try to make the Estate accept a restructured debt payment, then SRC may file for bankruptcy protection, assuming that it can demonstrate to a bankruptcy court that such a proceeding is warranted. Of course, were it able to proceed with bankruptcy, SRC's officers would be released from management responsibilities, because the applicable bankruptcy statute does not permit for debtor-in-possession in railroad cases. In any event, a trustee probably would opt to liquidate the railroad in the interest of creditors, rather than restructure SRC's debt.

²⁶ Corby Estate, 1963 Pa. Dist. & Cnty. Dec. LEXIS 118, * 1, 32 Pa. D. & C. 2d 105, *106 (Chester Co. 1963).

²⁷ Neff's Appeal, 57 Pa. 91, 97 (Pa. 1868).

²⁸ Kauffeld's Estate, 28 Pa. Super. 162, 168 (1905).

the decedent.²⁹ A determination as to whether the executor acted in good faith is made by the court on a case by case basis.

The Pennsylvania Fiduciary Guide summarizes the executor's duties to collect debts owed the estate. The reason for the duty is of course that the executor is obligated to include all debts owing the estate in the inventory of the estate and further to act in the best interest of the estate. Foregoing collection of a debt owed to the estate is detrimental to the estate and potentially personally detrimental to the executor as discussed above.³⁰ It is interesting to note that SRC indirectly acknowledges that the Estate's executor, John Willever, is under a legal obligation to wrap up the Estate promptly and in accordance with his fiduciary obligations under state law. For example, SRC's witnesses Mr. Bickleman states that "the Executor of the Estate . . . has been reluctant to pursue the present aggressive course of action against SRC, [but] feels that if he does not[, then] he will be subject to legal action by the BCHS."³¹ To put the duties of the Estate's executor into perspective, George M. Hart died on April 17, 2008, and his will was probated seven days thereafter. Although the Estate has been open for three-and-half years, SR has not paid one cent of its debt to the Estate.

In light of the RTP interest in the honest and efficient management of railroads, Board policy favoring railroad creditworthiness, and Pennsylvania law mandating that the Estate's executor promptly collect debts owed to the Estate (and to conclude it), the proposed abandonment would quite clearly advance important public interests. Board denial of the

²⁹ Neff's Appeal at 96.

³⁰ M. Paul Smith, et al., Pennsylvania Fiduciary Guide, § 6.23 (6th Ed. 2007).

³¹ SRC Protest, V.S. Bickleman at unnumbered page 7; see also SRC Protest, V.S. Williamson at 8 ("Willever is only proceeding under threat of suit from . . . BCHS . . . if he does not collect all the money.") Such sour grapes comments unfairly denigrate Mr. Willever. In truth, Mr. Willever is acting out of a desire faithfully to carry out his duties as executor and, in the process, honor the wishes of his close friend, Mr. Hart, as set forth in Mr. Hart's will.

Application, on the other hand, would thwart important public interests at the expense of meager public benefits that would flow from preservation of this rail line.

D. Other Factors Bearing on the Board's PC&N Analysis

There is considerable verbiage in SRC's Protest (particularly in the attached verified statements) that has nothing to do with the merits of the Application, much of it devoted to irrelevant personal attacks and blame-shifting. On the other hand, there are elements of the Protest and of the other comments filed in response to the Application that warrant a specific response here. Some of these issues are addressed in the preceding sections of this Rebuttal, but the Estate will respond serially below to issues not addressed (or not fully addressed) above.

1. The facts of this case more closely approximate those in City of Creede and Chelsea, cases where the agency granted abandonment, and bear little resemblance to the facts in Seminole Gulf and Yakima

From the Estate's perspective, this proceeding is unusual. To the Estate's knowledge, never before has the creditor of an inactive railroad invoked the agency's abandonment proceedings to facilitate foreclosing upon railroad assets. As a general rule, the public interest advanced by the abandonment applicant in such cases depends upon the elimination of the targeted rail line, so that the property may be put to other use. That is not the case here. The Estate recognizes that, as a matter of policy, the Board strongly favors the preservation of lines of railroad where there is adequate justification for it to bar abandonment. On the other hand, the agency has at times recognized that, under the particular facts and circumstances at hand, abandonment is the appropriate option, particularly where the facts suggest that the railroad is merely using the Board's jurisdiction as a shield. It has done so, for example, in City of Creede and Chelsea, both of which possess fact patterns consistent with those here.

In City of Creede, the Board confronted a situation where the local community, desiring to dismantle a long-out-of-service line segment owned by the Denver & Rio Grande Historical Foundation (“DRGH”) to facilitate tourist parking improvements in Creede, CO, aggressively pursued an effort to wrest DRGH’s property from it by way of abandonment. As is the case here, DRGH was not an operating carrier. DRGH opposed abandonment, claiming that the targeted line could be put to use for both passenger excursion and freight operations. In so doing, DRGH offered evidence concerning several potential freight shippers that had expressed interest in freight service.

The Board carefully evaluated the shipper protests, and found the evidence of shipper need to be unconvincing, largely because none of the shippers provided definite traffic commitments, and because all of the would-be shipper evidence was unreliable and speculative. In short, the Board determined that the would-be shippers demonstrated neither a need for rail service over the targeted line, nor a solid commitment to make use of the line if it were to be preserved. Furthermore, the Board rendered its decision mindful of the fact that, as is the case with SRC here, DRGH’s principal focus was tourist train operations, not freight service.

In Chelsea, the ICC granted the abandonment of an out-of-service rail line owned by Consolidated Rail Corporation (“Conrail”) where the abandonment applicant persuaded the ICC that Conrail’s asserted reactivation of the targeted line would be unworkable. The ICC observed that Conrail appeared to be motivated to fight the abandonment to avoid its contractual obligation to remove viaduct infrastructure along the targeted rail line (at substantial cost) in the event the ICC approved the abandonment.³² In that case, as SRC has done here, Conrail argued

³² Chelsea, 8 I.C.C.C.2d at 775.

that abandonment was inappropriate, because the railroad possessed, and was developing, an elaborate plan that would restore freight service over the targeted line.

Conrail contended that the targeted line had significant freight traffic potential. The abandonment applicant, relying on Conrail's responses to discovery, presented evidence to show that Conrail's plan to restore freight service to the line, in view of the restoration costs, logistical issues, and anticipated freight volumes, was neither practicable nor economically sound. Conrail responded that all it needed to do to meet its burden of proof against abandonment was to offer evidence of the targeted line's asserted traffic potential, including a prospective shipper's expression of interest in rail service (an expression of interest that the ICC found to be lukewarm at best). Conrail argued that, as long as it was acting within the scope of "managerial discretion," questions of operational impediment and economic infeasibility were irrelevant and immaterial, and it insisted that the Board should refrain from second-guessing the wisdom or legitimacy of Conrail's plans.³³

The ICC disagreed with Conrail, finding that the abandonment applicant's "assertions that the proposed operation is economically impractical . . . are highly relevant in making a [PC&N] ruling."³⁴ The ICC then proceeded carefully to examine the evidence, which confirmed that Conrail's plan was neither practicable nor economically rational. Among other things, the ICC noted that Conrail's freight transportation plan depended upon a number of circumstances beyond the railroad's control, that the anticipated freight revenues would most likely not be enough to cover the cost of operations, and that, even if the operation could generate positive revenues, such income would be insufficient to justify line restoration expenses.

³³ Id. at 779-780.

³⁴ Id. at 780.

In opposing abandonment here, SRC is acting out of an interest to avoid burdensome debt obligations, just as Conrail in the Chelsea case was clearly motivated to avoid costly contractual obligations that would result from abandonment of the targeted line. In Chelsea, the ICC was well aware of Conrail's motivations, and it clearly influenced the agency's PC&N analysis. For the same reasons, the Board should undertake its PC&N analysis here in light of the fact that SRC has similar incentive to use the Board's continuing jurisdiction over the SRC Line as a basis to evade a burdensome contractual obligation.

As with Conrail in Chelsea, SRC has not articulated a freight service reactivation plan that is either operationally feasible or economically rational. Documents SRC has produced in discovery establish that SRC management knows there is no operationally feasible or economically rational freight plan for SRC. In the face of evidence and argument to the contrary, SRC has never produced a business plan that demonstrates that it has a dependable plan to restore the SRC Line to service. The Estate does not question SRC's *desire* to see its rail line restored to service, but its *ability* to restore the line to service depends upon factors, such as the flow of charitable contributions and the availability of volunteer manpower. SRC's asserted managerial determination to restore the SRC Line to service is comparable to Conrail's asserted "managerial discretion" in Chelsea – the question is not whether the railroad *wants* to accomplish a certain objective, but rather, realistically, can it? In this case SRC has not proven its financial wherewithal, not at least without avoiding its debt obligations to the Estate.

And, as in Chelsea, there are obstacles to SRC's purported freight reactivation plan that are beyond SRC's control. No freight traffic can originate or terminate on SRC unless the connecting NCR Line is operational. But even with SINTOH installed in the NCR Line, there is no definitive plan to restore the northern half of the NCR Line to service. Accordingly, even if

SRC could restore the SRC Line to service in the foreseeable future, freight service still would not resume unless and until an out-of-service segment of the NCR Line that is even longer than the entirety of the SRC Line is rehabilitated as well.

The Estate has presented evidence, as did the applicant in Chelsea, that freight service is not financially rational. The Estate's un rebutted evidence comes directly from the writings of SRC management, and it has been presented to the Board at pages 21-22 of the confidential version of the Application as well as Confidential Exhibits AA through CC attached thereto. As the ICC explained in Chelsea, to disprove the Estate's evidence, SRC would have needed to demonstrate that the volume of traffic available to railroad and the rates at which such traffic would move would be enough to justify freight operations and freight-specific capital expenditures. For example, even if SRC could return its own 7.4-mile railroad to operating condition, and could sustain operations primarily (if not exclusively) on the basis of charitable contributions and excursion train revenue, it appears that the costs associated with restoring the roughly 9 miles of the northern half of the NCR Line to service would have to borne by freight traffic revenues exclusively. But would there be sufficient post-operating-cost net freight revenue to justify rehabilitation of the northern half of the NCR Line? The evidence in this proceeding suggests that this is highly doubtful. SRC has never provided a freight operating plan showing that freight revenues for traffic moving over the SRC Line and NCR Line would be sufficient to cover even avoidable costs.

Both City of Creede and Chelsea show that the agency undertakes a thorough and pragmatic assessment of a rail line's situation in cases where it is asked to remove its jurisdiction over that line, and that the agency balances the rail line's true prospects against countervailing public interests. Just as it did in City of Creede and Chelsea, the Board must not here blindly

accept as the decisive factor the mere possibility that a line might one day again host freight service, but it must instead evaluate the rail line's freight traffic prospects, and determine whether there exists a genuine need for the rail line in view of all of the pertinent facts. If the Board does so here, then it surely will find that this proceeding has much more in common with cases such as City of Creede and Chelsea, where the agency granted adverse abandonments, than it does with the cases upon which SRC relies – Seminole Gulf and Yakima.³⁵

Although SRC likens the situation here to that in Seminole Gulf – where the Board denied Lee County's adverse abandonment application designed to facilitate a road widening that the record reflected Lee County could accomplish (albeit at higher cost) without condemning property belonging to Seminole Gulf Railway ("SGRY") – the facts here are actually strikingly dissimilar. The very first paragraph of the Board's PC&N analysis in Seminole Gulf discloses the stark contrast between that case and the proceeding at hand:

The record here does not support a finding that the PC&N require or permit the abandonment of this line. Although [SGRY] will lose its only current shipper on this line in the near future, the railroad continues to operate over the line at the present time. This is not a line that is inoperable or needs major repairs, and unlike many cases where adverse abandonment applications have been granted, this case involves a line that is presently carrying traffic.³⁶

That short paragraph reveals numerous critical distinctions between the cases. First, SGRY was an active, freight-carrying short line railroad, unlike SRC. Second, the targeted SGRY line segment was in active freight use and carrying freight traffic at the time of the abandonment proceeding, entirely unlike the SRC Line. Third, the Board observed that SGRY's line was "not inoperable" or in need of major repairs, again very much unlike the SRC Line.

³⁵ Yakima Interurban Lines Association – Adverse Abandonment – In Yakima County, WA, STB Docket No. AB-600 (STB served Nov. 19, 2004) ("Yakima").

³⁶ Seminole Gulf at 5 (citing Modern Handcraft, Inc. – Abandonment, 363 I.C.C. 971, 972 (1981)).

In the above-quoted passage, the Board specifically distinguishes Seminole Gulf from those cases where the agency granted the abandonment because the line in question was out of service and not carrying traffic. Taken to its logical conclusion, the above-quoted passage suggests that the Board would have been inclined to *grant* the requested abandonment in Seminole Gulf, had the facts reflected, *as they do here*, that the rail line – (1) was inactive; (2) had no freight shippers; (3) was inoperable and/or in need of major repairs.

The circumstances surrounding the Board's decision in Yakima are equally inapposite. In that case, the abandonment applicant, a ranch-owner that wanted quiet enjoyment of its land, sought the abandonment of a 1-mile, middle section of a rail line owned by Yakima Interurban Lines Association ("YILA"). The abandonment would have rendered the remaining portions of YILA's line on either end of the targeted segment isolated from each other. YILA's line had been long out-of-service, like SRC's line, but the Board's decision in Yakima reveals significant differences with the facts here.

Although the Board in Yakima recognized that the applicant landowner had a legitimate interest in the removal of YILA's track, the Board also found that, on balance, removal of the bothersome encumbrance on the applicant's property (YILA's right-of-way was in the form of an easement), was not outweighed by the public interest in preserving the line where – (1) shippers had expressed an interest in using the line again; (2) the connecting Class I freight railroad opposed the abandonment; (3) the surrounding local governments not only opposed the abandonment, but also had communicated their willingness to provide funds to assist with the restoration of YILA's rail line; (4) a third party rail operator stated an interest in entering into a contract to provide service over YILA's line; and (4) the State of Washington Department of Transportation (which had already provided YILA with \$516,000 in loans for rail line restoration

subject to a lien on YILA's rail assets) had committed to provide an estimated \$200,000 in financial assistance to Yakima County to permit the county to acquire the line from YILA, to clear its liens, and to supply an estimated \$300,000 to complete restoration of YILA's line.

In Yakima, the Board explained that it was motivated to deny the adverse abandonment application due to the "substantial public funding had been committed to preservation of the rail corridor as a whole," and because "the governmental entities proposing to reinstate operations have feasible plans to do so."³⁷ In denying the adverse abandonment, the Board recognized that, despite the considerable degree of public financial commitment, line rehabilitation might not occur as YILA and the affected communities expected. Accordingly, the Board hedged its bets in denying the abandonment, advising that the applicant could seek "to reopen or file a new abandonment application, should the proposed rehabilitation and restoration not occur within a reasonable period of time."³⁸

By comparison, the situation facing SRC is not nearly as rosy. Granted, SRC has obtained written statements from a few interested state subdivisions opposed to the subject abandonment, and it has short letters from three entities (Pen-Mar, Ma&PaRPS, and Internet Factory) expressing an interest in rail service, but, *unlike* in Yakima:

- SRC has no local or state commitments to fund necessary rail line rehabilitation.
- There are no current plans for any state subdivision to purchase the SRC Line.
- Neither SRC nor the interested state subdivisions have a "feasible plan" to restore the SRC Line (or, for that matter, to restore the entirety of the connecting NCR Line).

³⁷ Yakima at 5.

³⁸ Id. at 6. SRC purposely and misleadingly references the Board's statement that the adverse abandonment applicant in Yakima could file a new application in the event that public commitments to restore the YILA line did not result in actual progress, but leaves out the part of the decision that indicates that the applicant could also at the appropriate juncture reopen the existing abandonment proceeding, rather than initiate a whole new process.

- SRC has no support from a connecting freight carrier (SINTOH is not a freight carrier).
- SRC lacks an active and viable connection to the balance of the interstate rail network.

But there is far more to the Yakima story that is worth considering here, and it is a story that is instructive for all concerned. Specifically, in Yakima, the Board based its decision, in part, on the fact that Yakima County was engaged in an effort to acquire YILA's rail line and was securing state funds to restore it. As it happens, less than two years following the Yakima decision, YILA elected *voluntarily* to abandon its rail line pursuant to the two-year-out-of-service exemption procedures in order to facilitate the transfer of its rail line (right-of-way *and* track) to Yakima County via the Board's interim trail use provisions. The Board noted in the course of that abandonment proceeding that:

YILA . . . intends [upon obtaining abandonment authority] to transfer the right-of-way to [Yakima] County, which, in turn, intends either directly to seek funds to complete restoration of the line for rail service and then to contract with an operator under a modified certificate to provide rail service, or to contract with a third-party operator for both completion of restoration and provision of rail service . . . [T]he line is currently subject to \$764,061 in liens (with interest accruing), the bulk of which are held by the Washington State Department of Transportation (WsDOT) . . . WsDOT . . . is unwilling to provide further financing necessary to complete rehabilitation unless the line is owned by a government entity. YILA . . . is unable to raise further private funding and . . . can foresee no scenario in which any private party either could obtain sufficient funding from a lender to restore rail service or could prudently invest its own assets, given the liens already applicable to the property. According to YILA, transfer of the property to [Yakima] County is the best and only avenue to keep the line intact and to qualify for financing for possible restoration of rail service.³⁹

Cutting through the rather convoluted history of the proceeding, it is sufficient to note that Yakima County ultimately reached an agreement under the Board's interim trail use provisions to assume possession of YILA's line.

³⁹ Yakima Interurban Lines Association – Abandonment Exemption – In Yakima County, WA, STB Docket No. AB-600 (Sub-No. 1X), slip op. at 2 (STB served Feb. 17, 2006) ("Yakima – Part 2").

In contrast to Yakima and Yakima – Part 2, no state subdivision has committed funds for the preservation or restoration of the SRC Line, but the York County Rail Trail Authority, among others, have expressed an interest in the possibility of acquiring the SRC Line for interim trail use or “railbanking” purposes, suggesting that York County might be interested in acquiring both the SRC Line’s right of way and its track and track structure. York County, as the owner of another railbanked line (the NCR Line), would be well-suited to acquire the SRC Line once it is authorized for abandonment. If, following Board abandonment authorization, York County were to acquire the SRC Line (including the track structure) for fair market value, it could then install SRC as either a Modified Certificate operator,⁴⁰ or it could, like it has done with SINTOH, contract with SRC to operate the SRC Line as a purely non-common carrier excursion operator.⁴¹

The Yakima – Part 2 proceeding provides a template for a mutually acceptable and workable solution to SRC’s predicament, but it depends upon the Commonwealth’s and/or York County’s commitment, financial and otherwise, to the preservation (*i.e.*, railbanking) of the SRC Line. The Estate hopes that York County and other interested state subdivisions can be much more definitive concerning their respective rail banking objectives and their respective financial commitments to the same. If there is genuine hope for the SRC Line, then the Estate submits that a state or local undertaking such as the one outlined in Yakima – Part 2 is the best, and perhaps only, realistic approach to achieve that objective.

⁴⁰ See 49 C.F.R. part 1150, subpart C (Modified Certificate of Public Convenience and Necessity).

⁴¹ SRC claims that abandonment would force SRC “out of business as a rail carrier” (Protest at 12). The Yakima – Part 2 model shows that this need not be the case. Rather, instead of being both the owner and operator of the SRC Line, York County or another state subdivision could acquire the SRC Line once authorized for abandonment, and SRC could emerge from this process as a non-asset owning company designated by the county or other state subdivision to serve as the rail line’s operator.

2. Pen-Mar is not a “definite freight customer”

SRC’s claim that it has “at least one definite freight customer and multiple prospective freight customers that intend to use the line upon its return to service” (SRC Protest at 2) is unsupported by the facts. The “one definite freight customer” (Pen Mar) is hardly definite. SRC and Pen-Mar have not discussed in detail, much less reached an understanding concerning, rates and service. Pen-Mar has not entered into a freight service contract committing itself to certain traffic volumes or revenues, and has not expressed a willingness to do so.⁴² All we know about Pen-Mar is that it – (1) is in the metal recycling business, (2) is “attempting to develop [its SRC-served] facility and grow [its] business as the economy recovers,” and (3) “anticipate[s] a need for direct rail service within the next two years or less.”⁴³ We also know that SRC and Pen-Mar have had “[p]reliminary discussions . . . concerning obtaining suitable railcars, arrangements to load the railcars and obtaining rates for rail service.”⁴⁴ In short, Pen-Mar’s short letter (just over a page) contains little, if anything that could be fairly described as definite, aside from its desire to see a possible rail service option preserved into the future.

SRC’s Mr. Bickleman has had occasion in April of this year to assess whether or not SRC could provide economical freight service to Pen-Mar, and the results of his efforts are chronicled in the confidential version of the Application, particularly at Confidential Exhibit AA. Considering the contents of that exhibit, the Estate wonders (as should the Board) “what has changed since April?” SRC does not say. Can SRC obtain the necessary rail cars, at what rate is Pen-Mar willing to ship via SRC, and can SRC meet Pen-Mar’s rate requirements? And what if

⁴² SRC says Pen-Mar is a “major customer.” Without showing that Pen-Mar *will* ship via SRC and in what amounts if it did, it is impossible to know what SRC means when it describes Pen-Mar in this way. SRC’s phrasing is nothing but self-serving overstatement.

⁴³ Opposition letter of Jason Sweeny, Manager of Pen Mar at 1.

⁴⁴ *Id.* (emphasis added).

the SRC Line and the connecting NCR Line are not operational within Pen-Mar's two-year time frame? If Pen-Mar was a definite shipper, the various terms and conditions for rail service would be established, and Pen-Mar would have entered into a traffic agreement cementing its commitment to SRC. But none of this has been done, and there is no evidence establishing that SRC service to Pen-Mar would be feasible or economically practicable.

Pen-Mar appears to be interested in shipping scrap metal, a commodity that is highly truck-competitive, and that has been specifically exempted from Board regulation pursuant to 49 C.F.R. § 1039.11(a). As is the case with most exempted commodities, the ICC determined that the rail transportation of scrap metal need not be subject to regulatory oversight because trucks and/or other modes proved to be effective competition, generally rendering rail carriers unable to exercise market dominance over the traffic.⁴⁵ Pen-Mar is a case in point, relying as it presently does on truck transportation to reach its customers. Thus, while Pen-Mar claims that it "needs" rail service, it does not explain why this is so, why truck transportation is inadequate for its present and future purposes, or why SRC rates and service would be economically preferable to trucks. Moreover, SRC would have to struggle to secure traffic that, being truck-competitive, might only move at rail rates that do not fully capture all of SRC's costs.

The other prospective freight customers are hardly sure bets, and it appears that SRC has included them as make-weights to address the utter paucity of genuine freight traffic potential.

They are as follows:

- Maryland & Pennsylvania Railroad Preservation Society ("Ma&PaRPS"). Neither SRC nor Ma&PaRPS explains when and under what circumstances SRC provided service to it. (Such service must have been prior to 1992.) Ma&PaRPS does not connect to SRC, and it isn't clear how SRC service is essential. We also aren't told for what purposes the

⁴⁵ See Rail General Exemption Authority – Exemption of Ferrous Recyclables, 10 I.C.C.2d 635 (1995); Pejepscot Industrial Park, Inc., d/b/a Grimm Industries – Petition for Declaratory Order, STB Finance Docket No. 33989, slip op. at 6, n 12 (STB served May 15, 2003).

organization used SRC service.⁴⁶ What is more, SRC did not previously identify Ma&PaRPS among the historic users of the SRC Line, including in response to the Estate's discovery requests concerning SRC's efforts to solicit freight business.

- The former Columbia Forest Products facility at New Freedom. SRC calls this is a "new business opportunity," evidently one so new that it, also, was not identified in discovery. There is no shipper at the location, and no evidence that whoever may acquire the facility will need rail service. If there were good reason to believe that rail service would be crucial to a future facility-user, then surely the real estate developer would have advised the Board. And if the unused facility is so promising, why does it warrant only three sentences in SRC's Protest?
- Mann & Parker Lumber Company ("Mann & Parker"). Both SRC and the Estate are aware of Mann & Parker's presence at New Freedom, but evidently it is not interested in rail service. In its discovery responses, SRC did not identify Mann & Parker as a prospective shipper. Mann & Parker uses trucks, and appears to be content with that arrangement. SRC suggests that Mann & Parker might cease operations in the foreseeable future (thereby opening the doors to a more rail-dependent business), but unless SRC knows more about Mann & Parker's situation than it has revealed, this appears to be nothing but innuendo and speculation.
- The I-83 Industrial Park. This facility does not appear to be located on SRC, but would require rail line construction to be served directly. This prospective shipper – another SRC did not identify in response to discovery – gets two sentences in SRC's Protest, and it has not supplied any separate statement opposing abandonment.
- Internet Factory, Inc. The Estate is not familiar with this enterprise, and it appears neither is SRC. Internet Factory, which claims to be interested in restoring/refurbishing old locomotives using "proprietary green technology," recognizes that SRC "has some obstacles to overcome," but claims that it hopes to locate on SRC's line some time during the course of its asserted "10+ year project," and to ship as many as 22 carloads of traffic and 5 locomotives per year. The Estate doubts that Internet Factory's anticipated (but not guaranteed) 27 revenue movements would make freight service remunerative, but at least Internet Factory gives an estimate of its carload capabilities, unlike any other shipper prospect. Internet Factory does not indicate where it intends to locate along the SRC Line, or why it has chosen to locate on SRC's Line. For that matter, it is unclear why it is important to Internet Factory that the entire 7.4 miles of the SRC line remain intact.

None of SRC's purported shippers has committed to moving freight traffic over the SRC Line, and none presents itself as anything more than a theoretical traffic possibility. None can be

⁴⁶ Upon information and belief, the Estate understands that Ma&PaRPS owns certain non-federally regulated trackage unconnected to the interstate rail network over which the organization occasionally hosts track speeder outings.

relied upon to provide traffic, most have not offered a written statement in support of SRC's efforts against abandonment, all are thoroughly speculative, and SRC has not shown that the traffic levels it anticipates would support freight service. Although SRC would rather it did, the Board does not stop its freight traffic assessment by asking whether the railroad can simply *identify or list* prospective shippers. Rather, such prospects must be fully substantiated, are open to challenge by the abandonment applicant, and are subject to agency scrutiny to determine whether the alleged traffic is reliable, plausible, committed, and economically feasible, or whether instead the purported future traffic prospects are too speculative to be accorded much, if any, weight in the Board's PC&N analysis.⁴⁷

3. SRC doesn't say when any or all of its rail line will be operational

SRC and the Estate seem to agree that the SRC Line is not in operating condition. Although neither SRC nor the Estate has a firm grasp on the full extent of rehabilitation needed to restore the SRC Line, or an estimate of the cost to do so, SRC reports that it is in the process of "revitaliz[ing] the line so that it is fit for service."⁴⁸ Materials provided to the Estate in discovery indicate that SRC purported to have a 5-year plan under which it intended to restore the SRC Line on a contiguous segment-by-segment basis, beginning at the eastern end of the railroad at Stewartstown, and ending at New Freedom.⁴⁹ The Estate understood that, as each segment of the SRC Line was repaired, SRC would reactivate it for excursion operations.

SRC now explains that its 5-year track rehabilitation plan was merely a "guide" to get SRC's "track program going with some direction."⁵⁰ SRC has departed from its nominal plan to

⁴⁷ See City of Creede at 12.

⁴⁸ SRC Protest at 2.

⁴⁹ See Application at 12.

⁵⁰ SRC Protest, V.S. Williamson at 16.

rehabilitate and reopen the SRC Line in increments, opting instead to address track rehabilitation on a spot basis, with the expectation that the SRC Line will reopen by 2015. It is not clear whether SRC still plans to reactive discrete sections of the SRC Line before 2015, but it no longer appears that this is the case.

4. SRC is asking the Board to allow it to avoid its obligation to creditors

Under the provisions of the agreement between Mr. Hart and SRC, SRC's debt obligations (totaling \$352,415) were due in full upon demand. Mr. Hart's will instructed the Estate's executor, John Willever, to collect on the debt, and Mr. Willever is attempting to do so in accordance with his legal and fiduciary obligations. Although SRC is unhappy with developments, it does not and cannot honestly assert that the Estate's demand for immediate repayment is contrary to the provisions of the underlying debt instrument.⁵¹ SRC is obligated to repay the loan amount upon demand, and such demand was made in December of 2008. So, SRC has, and has had for nearly three years now, a legal obligation to repay the amount in full. SRC has repeatedly acknowledged its obligation to the Estate, yet has not honored it. Instead, SRC offered a repayment proposal that the Estate was under no legal obligation to accept, and that was, for reasons set forth below, rejected.

SRC claims that it "does not ask that the Board allow [SRC] to avoid its obligations to creditors."⁵² But, in opposing the Application, SRC *is by definition* asking the Board to allow the railroad to avoid its obligations to creditors – specifically its obligation immediately to repay \$352,415. SRC knows that if the Board were to deny the Application, the Estate would be federally preempted from foreclosing upon SRC assets even in the clear presence of SRC

⁵¹ SRC depicts the prompt repayment of the debt as a "more favorable option" to the Estate (SRC Protest at 7), thereby acknowledging that the Estate is within its legal rights under the contract to refuse such a repayment arrangement.

⁵² SRC Protest at 7.

default, and so SRC would be in a position to dictate repayment terms (or no repayment terms if it thought it could do so) to the Estate with the knowledge that the Estate possesses little, if any, negotiating leverage. By opposing the Application, SRC knows full well that *is* asking the Board to void the Estate's right to prompt repayment of the amounts owed to it.

5. The Estate and its residuary beneficiary have given due consideration to SRC's 5-year repayment plan, and have properly rejected it

SRC makes much of its 5-year debt repayment proposal that the Estate considered and rejected. As should be clear from the foregoing section, however, the Estate is under no legal obligation to negotiate an extended debt repayment plan with SRC, and it is certainly under no obligation to accept a proposal that would unnecessarily reduce the value of the Estate's claim. Yet SRC argues that "the Estate and its residuary beneficiary have failed to give serious consideration to the SRC's offer of a lien on Railroad assets and a viable repayment plan" (Protest at 3). SRC could not be more wrong; in fact, the details of SRC's repayment plan show that SRC has failed to take seriously its obligation to repay the Estate. As the Estate explained before and will prove in this Rebuttal, accepting SRC's 5-year repayment proposal would have been utterly foolish, and potentially would have subjected the Estate's executor to legal liability for failure to fulfill his fiduciary duty to the sole residuary beneficiary.

SRC extended its 5-year repayment proposal by way of a letter dated March 10, 2010, roughly 13 months after the Estate's written demand for repayment. The Estate believes that this much-discussed repayment proposal largely speaks for itself, and so it has attached SRC's repayment proposal hereto as Rebuttal Exhibit A. SRC's proposal begins with a statement that it will "pay the lien in full in the amount of \$352,415.00 over a period of five (5) years beginning April 2nd, 2010." As such, the proposal acknowledges at the outset that the Estate already possesses a lien on SRC property. The proposal offers a "year one" payment of \$25,000 by

April 2, 2011. In April of years two through four, SRC would make annual payments of \$50,000 each, and a final payment in year five (April 2, 2015) of \$177,415. The Estate would not recover even 50% of the outstanding debt until 2015 under SRC's heavily back-ended proposal. The proposal includes no interest payments, and thus fails to acknowledge the reduced value of the debt obligation if it were to be paid over 5 years, compared to immediate payment. Moreover, the proposal, offered as it was to stave off foreclosure, includes no penalty provision in the event of subsequent default, and no provision obligating SRC to liquidate assets promptly if it fails to meet any of its installment deadlines.

Where would the money come from to pay each proposed installment? SRC explains in its repayment proposal that it "expects to raise funds from two primary sources. The first being revenues from excursions as incremental portions of the railroad are returned to service and the second being from a capital fundraising campaign presently under development by the Friends of the Stewartstown Railroad, Inc., a 501(c)(3) non-profit corporation."

It is easy to see why the Estate rejected SRC's proposal out of hand. The Estate's executor is obligated to wrap up the Estate as soon as possible and to maximize the value of the Estate for the benefit of its residual beneficiary. Acceptance of a 5-year repayment plan, especially one that depends upon highly speculative funding sources, would run contrary to the executor's mandate. Additionally, the residual beneficiary, BCHS, was advised of the proposal, and it informed the executor that the proposal was unacceptable for readily apparent reasons.

Aside from avoiding foreclosure costs, the Estate has no economic incentive to accept SRC's proposal and to forego immediate collection. As noted, the proposal lacks an interest payment provision and does not obligate SRC to take further corrective action, such as voluntary abandonment, in the event of subsequent default. SRC states in its Protest that its repayment

proposal includes an “offer of a lien.” The proposal does *not* include the offer of a lien on SRC assets, but rather recognizes the Estate’s existing lien. (Under Pennsylvania rules of civil procedure, a recorded judgment as the Estate possesses in this case constitutes a lien on the debtor’s property.)⁵³ Any offer of another lien on SRC assets already pledged to the Estate as security for SRC’s debt obligation would be meaningless.

Easily the most astonishing and problematic element of SRC’s proposal is the purported funding sources that SRC expects to tap to service the debt – SRC passenger excursion revenues and charitable contributions collected by the Friends of the Stewartstown Railroad, Inc. (“Friends”).⁵⁴ Even if the Estate had the latitude to accept SRC’s repayment plan, the revenue and capital streams from which the payment installments would derive are dubious at best. First of all, SRC has not commenced excursion operations. SRC had expected under its original, 5-year rehabilitation plan to reactivate segments of the SRC Line in annual increments from the end of the line at Stewartstown westward, and to commence operations on those segments beginning at least this year. But as is reflected in Rebuttal section II.D.3, above, SRC has departed from its original rehabilitation plan, and it is no longer clear when SRC will reopen any of the line to excursion service. And even if SRC were able to reopen portions of its line in the very near future, there is no evidence, and no business plan, indicating that SRC would have sufficient net income in each year to meet its commitment under the repayment plan.⁵⁵

⁵³ See PA R.C.P. No. 3023 (2011).

⁵⁴ Friends is a non-profit organization dedicated to the history and preservation of the Stewartstown Railroad. Although it is closely allied in interest with SRC, Friends is not affiliated with SRC. See <http://www.stewartstownrailroad.com>.

⁵⁵ SRC’s ability to raise funds from excursion operations should be measured against its own, candid reflections on excursion economics and “ridership base” set forth at page 22 the confidential version of the Application. SRC’s expectation that limited excursion operations would produce a reliable net income stream conflicts with the fact that, SRC survived in the past as an excursion-only operation thanks over \$352,000 of capital infusions from Mr. Hart.

Second, although it is possible that Friends could raise sufficient funds through a “capital fundraising campaign” to help SRC repay its debt, there is absolutely no assurance that this campaign would actually succeed, or that potential contributors would donate money to pay down a third party railroad’s debt. Friends is doubtlessly motivated to help SRC, but it is under no obligation to do so. It is not, for example, a party to the repayment proposal. In fact, the Estate understands that Friends’ fundraising campaign efforts have not met expectations, largely because those tasked with raising funds have been reluctant, unwilling, or unable to solicit contributions that would be used to fund a third party’s debt repayment.

As a non-operating railroad, one would expect SRC to have minimal revenues and limited funding sources from which to repay its debt obligation. SRC financial data, such as the SRC “Income and Expense Summary 2000-2011” (Application, Confidential Exhibit DD) bears this out. But the record also shows that SRC has funding sources besides the potential charitable contribution flow-through from Friends and the potential (but non-existent) excursion revenue. SRC derives revenue from rail car storage, “speeder car” rental, a licensing agreement with Shrewsbury Township, and by liquidating scrap and surplus material.⁵⁶ None of these established forms of SRC income were pledged to the Estate as part of the repayment plan – SRC has instead reserved these funding sources for its efforts to restore the SRC Line. In so doing, SRC proves that restoring its long-inactive rail line is more important than honoring its obligations to creditors.⁵⁷

The Estate’s rejection of SRC’s repayment proposal looks wiser still in hindsight. Neither SRC’s excursion plans nor Friends’ fundraising efforts appear to have met their

⁵⁶ Protest at 14, and V.S. Williamson at 10 (“SRC has taken steps to liquidate assets, and has sold considerable quantities of scrap steel and surplus materials to interested parties”).

⁵⁷ Because SRC has chosen not allow a bankruptcy Trustee determine whether SRC’s debt-servicing priorities are appropriate, it is now up to the Estate to see if the Board agrees with SRC.

respective marks (SRC is still inactive, except perhaps for the occasional track speeder outing). It is ludicrous, upon a careful examination of the facts, for SRC to assert that its repayment plan is "viable." If indeed it were viable, then SRC could have demonstrated on the record that it was and is able to meet its 2011 commitment under its repayment plan, and it could have shown that it was on track to meet its obligation for April 2012.⁵⁸ SRC has done neither, and very likely could not. Again, even if SRC could show its ability to meet its commitments under the March 2010 repayment proposal, accepting the proposal would be counter to the Estate's legal mandate.

6. The Estate does not want to dismantle the SRC Line

The Estate has repeatedly stated in this proceeding that it does not want to see the SRC Line salvaged, preferring, rather, that the SRC Line be sold for fair market value to an entity interested in preserving the railroad. Such an arrangement is much more likely to facilitate the prompt recovery of the amounts SRC owes than would foreclosure and subsequent salvage. Simply put, the Estate has both a sentimental and a business basis for not wanting to have to go down the more complicated salvage path.

For effect, and for utterly self-serving reasons, SRC argues that the Estate is intent on dismantling the SRC Line, and that granting the Estate's Application will, almost as a foregone conclusion, result in the SRC Line's salvage.⁵⁹ Worse, it appears that SRC has motivated a handful of interested state subdivisions and elected officials to oppose the Estate's Application

⁵⁸ The Estate has complained that SRC has not even made a partial repayment of its debt obligations, criticizing SRC for failing at least to offer the \$25,000 year one payment under its repayment proposal. SRC excuses its lack of an effort to offer partial repayment on the basis that the Estate had rejected SRC's proposal. The truth is that SRC has made no genuine effort to address the outstanding debt obligation, and that SRC assumes that it can ignore its obligation as long as the Estate rejects an extended payment plan. SRC's counter-argument is mere obfuscation, and it purposely avoids the Estate's points – (1) that SRC has acted in bad faith, and (2) that SRC is unable to adhere to the terms of its own proposal.

⁵⁹ See, e.g., SRC Protest at 4 ("whether the public convenience and necessity warrants the dismantling of the SRC").

on the basis that abandonment *will* lead to the salvage of the railroad, when that is far from certain at this time. The record in this case already makes clear that salvage of the SRC Line is not the Estate's preferred outcome here, and that it is willing to facilitate the timely sale of SRC's rail property at fair market value to an entity that wishes thereby to preserve the railroad.

7. SRC may never have a restored connection to the national rail network

Contrary to SRC's claims, there is no evidence to prove that SRC will "shortly" or ever regain a restored connection with the national rail network. For SRC, the inconvenient truth of the matter is that it is isolated from the balance of the interstate rail network because the NCR Line, SRC's only outlet, is out of service and lacks an active common carrier operator.

SRC does not dispute that the NCR Line is out of service, and seems to recognize that York County has not installed a freight service provider on that line entrusted with the rights and obligations of a freight common carrier. York County has installed SINTOH, a not for profit 501(c)(3) corporation, on the NCR Line for the limited purpose of "the construction and operation of an excursion train on the [NCR Line], featuring an 1863 reproduction steam locomotive and train set."⁶⁰ SINTOH explains that it is in the process of restoring the southernmost 9 miles of the NCR Line from New Freedom to Hanover Junction, PA, to allow for operation of its tourist train, adding, vaguely, that "future plans exist for the additional refurbishment of the [remaining roughly ten miles of the NCR Line] from Hanover Junction to York, Pennsylvania."⁶¹ But the NCR Line is about 19 miles long, and SINTOH's rehabilitation efforts are focused upon the southern half.

Whether SINTOH ever actually acts on "future plans" to restore the northern section of the NCR Line to service – or when that would happen – is anyone's guess. There is no assurance

⁶⁰ SINTOH Letter at 1.

⁶¹ Id.

that the entire NCR Line will be restored under SINTOH's stewardship, and there is no mention of the cost or feasibility of restoring the entire NCR Line. Moreover, SINTOH is not a rail common carrier. It has no STB-issued license and it has not invoked any class exemption or even the Board's Modified Certificate procedures pursuant to which it would assume the common carrier mantle on the NCR Line. These are among the reasons that the Estate believes that SINTOH has declined to transport SRC-originated or terminated traffic.

Although SINTOH states that it has been in discussions with SRC regarding the "possibility" of facilitating the movement of freight via the NCR Line, there is nothing in SINTOH's letter to indicate that SINTOH has the right to admit another rail operator onto the NCR Line for freight service purposes, or that York County has agreed to such an arrangement. Instead, SINTOH meekly but optimistically conveys that, "In our discussions with [SRC, York County], and others, the potential for freight has been considered, and will be considered, in the future."⁶² In short, SINTOH's responsive filing fails to offer a timetable for, or to assure, the complete restoration of the NCR Line, and does nothing to give the Board reason to believe that arrangements are now or will soon be in place with York County allowing for the restoration of freight operations on the NCR Line.

8. York County is most likely *not* a railroad, and does not appear to have any common carrier obligation with respect to the NCR Line

SRC takes great exception to the Estate's assertion that York County, despite its ownership of the NCR Line (SRC's essential rail freight outlet), is not a rail common carrier and has no "continuing obligation to provide common carrier rail freight service over the line upon request."⁶³ The facts and agency precedent, however, indicate that the Estate is correct.

⁶² Id. at 2.

⁶³ SRC Protest at 14.

The Estate and SRC agree that the NCR Line (USRA Line 145) was not included in the Conrail Final System Plan, and that the Commonwealth of Pennsylvania Department of Transportation ("PennDOT") thereafter acquired the NCR Line. There is no evidence, and the Estate's research of the matter discloses none, indicating that PennDOT sought or obtained ICC authority to acquire or operate the NCR Line. What is certain (and is reflected in the record here) is that PennDOT conveyed the NCR Line to York County in 1990. Again, the Estate cannot find any ICC notice or decision authorizing the PennDOT-York County transfer. That is not unusual or alarming, because, under the circumstances, York County did not need to obtain regulatory authority to acquire the NCR Line *unless* York County intended in the process to operate the line itself, and thereby to assume a common carrier obligation over it. The Estate has no reason to think that York County wanted, or sought to secure, a common carrier obligation.

As the Estate attempted to explain in the Application and will clarify here, rail lines not included in the Conrail Final System Plan are deemed by this agency to have been "authorized for abandonment,"⁶⁴ and, pursuant to longstanding agency precedent,⁶⁵ a state or state subdivision acquiring a line that has been abandoned or authorized for abandonment may do so without subjecting itself to regulatory oversight or to the common carrier obligations that would otherwise attach to the acquisition of an "active" rail line unless the acquiring state or state subdivision intends to operate the rail line itself.⁶⁶ The Estate has found no evidence that, in

⁶⁴ The Estate used the term "effectively abandoned," as opposed to the more technically correct terms "authorized for abandonment" or "approved for abandonment," in the Application. Regardless, the Estate's legal point here and in the Application is unchanged.

⁶⁵ Common Carrier Status of States, State Agencies & Instrumentalities, & Political Subdivisions, 363 I.C.C. 132 (1980) ("Common Carrier Status"), *aff'd sub nom. Simmons v. ICC*, 697 F.2d 326 (D.C. Cir. 1982).

⁶⁶ Common Carrier Status of States, State Agencies and Instrumentalities, and Political Subdivisions 49 CFR 1120A, Finance Docket No. 28990F (ICC served Jul. 16, 1981) at 9-10 ("A rail line which was approved for abandonment under the Final System Plan . . . comes within

acquiring the NCR Line, York County ever intended to subject itself, or to be subjected, to the various requirements of the Interstate Commerce Act, nor has the Estate found any evidence suggesting that York County ever intended to, or did, operate the NCR Line itself. Furthermore, the record does not establish whether York County is even legally authorized either to be a rail carrier or to assume to rights and obligations of a rail common carrier.

Under the circumstances, the Estate submits that a Board finding that York County is a rail common carrier saddled with all of the attendant rights and obligations of the same with respect to the NCR Line would come as unexpected and unpleasant news to the county.

E. Those Opposing Abandonment Add Little to the PC&N Analysis, but Could Help Preserve the SRC Line in Other Ways

A handful of public entities – York County Planning Commission, Stewartstown Borough, and York County Board of Commissioners – and elected officials – U.S. Congressman Todd Russell Platts and Pennsylvania State Representative Stanley Saylor – have written in opposition to the abandonment. Of these, only Congressman Platts, to his credit, mentions the conflicting interests between the Estate's legitimate debt collection efforts and the asserted

the meaning of 'abandoned or authorized for abandonment'); Wisconsin Department of Transportation and East Wisconsin Counties Rail Consortium – Petition for Declaratory Order – Common Carrier Status of Certain Operations in the State of Wisconsin, Finance Docket No. 32717, slip op. at 9 (STB served Dec. 8, 1997) (in which the Board explains that, in Common Carrier Status, "the ICC exempted a state from the need to obtain [regulatory] approval for a state's acquisition of lines approved for abandonment by the ICC or a bankruptcy court when the abandonment had not yet been consummated. The ICC also concluded that, in these circumstances, a state would become a common carrier only if it operated the line it was acquiring"); Pennsylvania Department of Transportation – Abandonment Exemption – Portion of the Valley Branch, Docket No. AB-373X, slip op. at __ (ICC served Apr. 29, 1993), 1993 MCC LEXIS 57, at **1 and 6 ("[a]t the time [PennDOT] acquired the segments at issue here[, all of which were not included in the Conrail Final System Plan], . . . each segment had been 'abandoned' within the meaning of 49 CFR 1150.21, and its acquisitions of the segments were exempt from [ICC] jurisdiction . . . Moreover, because [PennDOT] contracted with others to operate the lines, it incurred no common carrier obligation and may now abandon the lines without [ICC] authority") (citations to Common Carrier Status omitted).

public interest in preserving the SRC Line. The rest of the letters do not reflect awareness of the particulars of SRC's financial predicament or the circumstances that have led to it.

All of these letters have a significant commonality – they all offer exceedingly generalized statements of support for SRC, relying on speculative public benefits that could be advanced by preserving a rail line that could at some point in the future possibly see freight and/or passenger excursion service restored. These opponents claim that loss of the SRC Line would harm the local economy, although none of the commenters substantiate this claim. Most, if not all, of these commenters seem to have concluded that Board approval of the Estate's Application will definitely lead to elimination of the SRC Line, despite the Estate's repeated explanations that such a result would occur only as a last resort.

Not one of these abandonment opponents has, despite SRC's readily-apparent economic straits, demonstrated an interest or willingness to provide financial support to SRC, or to assume responsibility for its rail line. Rather, these letters offer little more than moral support for SRC and its cause. In the end, the opposition letters highlight generalized public benefits from preserving the SRC Line that, while appropriate for Board consideration, should be factored in accordance with the highly speculative and far-off nature of the benefit hoped to be achieved by preservation. If the Yakima and Yakima – Part 2 proceedings taken together are of any guidance, they show that a railroad facing SRC's current circumstances (desiring to rebuild its rail line but dependent upon the assistance of others – Friends, in this case – to do so; while struggling with its inability to meet its debt obligations) needs direct public intervention and financial support to have any chance. Otherwise, unless the Board takes the unprecedented step of invalidating the Estate's contract-based claim (something that no party has requested), then SRC will, in all certainty, ultimately succumb by reason of its inability to service its debt.

F. Interim Trail Use and Public Use Condition Requests

York County Rail Trail Authority (the "Trail Authority"), Shrewsbury Township, Shrewsbury Borough, and Hopewell Township have advised the Board that, in the event of abandonment, they believe that the SRC Line would be suitable for interim trail use. In particular, the Trail Authority, by letter dated July 19, 2011, requests "issuance of a Public Use Condition as well as a Certificate or Notice of Interim Trail Use rather than outright abandonment authorization" for the SRC Line. The Trail Authority's July 19 letter filing asks to prevent SRC from disposing of the rail corridor, "other than the tracks, ties and signal equipment," and to bar "removal or destruction of potential trail-related structures such as bridges, trestles, culverts and tunnels." In a supplemental filing dated August 18, the Trail Authority submitted additional comments that, although bearing predominantly on environmental and historic impact issues, suggest that the Trail Authority now might prefer that SRC not remove the track and track material from the line – possibly an indication of the Trail Authority's interest in "railbanking" the SRC Line (retaining existing track and track material) rather than in merely acquiring the SRC's Line's right-of-way.

To be clear, if no financially bona fide comes forward on a timely basis to acquire the SRC Line in the interest of preserving its legally "active" common carrier status, then the Estate has no objection to efforts to acquire possession of the SRC Line via the Board-administered interim trail use provisions, provided of course, that trails use negotiations are conducted promptly, in good faith, and in a manner that would not defraud SRC's creditors. To be clearer still, the Estate would not object under similar circumstances to an arrangement covered by the Board's interim trail use provisions whereby all of SRC's rail assets (including track and track structure) are included in a "railbanking" arrangement with the Trail Authority or another

suitable government subdivision.⁶⁷ Of course, the Estate would expect to be an integral part of the trails use negotiations.

At the same time, the Estate's willingness to facilitate trails use/rail banking is not determinative. Rather, such arrangements depend upon SRC, who owns the SRC Line and possesses the common carrier obligation that attaches. SRC cannot be made to negotiate trails use/railbanking, and if it objects to such arrangements, then that is the end of the exercise. But SRC has not indicated whether or not, in the event of abandonment (and in the absence of an OFA), it would be willing to negotiate any such trails use or railbanking arrangement.

Concerning the outstanding requests for a Public Use Condition ("PUC"), the Board has twice indicated that its PUC provisions are not available in this proceeding.⁶⁸ In view of the Board's position, the Estate would *not* support the issuance of a PUC if it is designed merely to facilitate possible acquisition of all or portions of the SRC Line right-of-way for recreational or other such purposes. This is particularly so if SRC declines to negotiate an interim trails use arrangement in the first place. But if the PUC was for the purposes of facilitating good faith negotiations for state or state subdivision to acquire all or most of SRC's rail assets for purposes of continued rail use (whether common carrier or merely excursion in nature), then the Estate would be amenable to Board reversal on the issue and the imposition of a PUC.

G. Other Matters

Attached to the Estate's Application is a statement from Captain Herman J. Bushman, Jr., an SRC director and the railroad's largest principal shareholder. Captain Bushman is a graduate

⁶⁷ Such an arrangement would be consistent with the general approach taken by the various interested stakeholders in the aforementioned Yakima – Part 2 proceeding, and it would be a very welcome development here indeed.

⁶⁸ Notice of Adverse Abandonment Application (Jul. 27, 2011) at 3 ("Because this is an adverse abandonment proceeding, public use requests are not appropriate and will not be entertained"); Office of Environmental Analysis, Environmental Assessment (Aug. 12, 2011) (same).

of the U.S. Naval Academy, and has completed a long and distinguished career as a naval officer. He has been closely associated with SRC since 1972, and has served as a director of the corporation since 1975. He elected to provide a verified statement in support of the Application because he disagrees with the way that SRC has evaded its obligation to the Estate.

Captain Bushman offered his steadfast opinion that SRC should honor its obligations and debts as they came due, and that the ethical solution to SRC's inability to meet its responsibility to the Estate would be to sell SRC's rail assets for fair market value to a responsible, well managed company or person with financial resources sufficient to properly restore and operate the SRC Line. That opinion was presented in good faith, and in a manner that, in Captain Bushman's view, was both in the best interest of the corporation and its shareholders, and wholly in accordance with his responsibility as a director of the corporation as set forth under Pennsylvania Corporate Law as set forth at 15 Pa. C.S.A. §512.

Unfortunately, SRC's management has not used Captain Bushman's verified statement as an opportunity to share its differing opinion on the propriety of its handling of SRC's debt obligations, or for that matter to engage in civil discourse. Instead, it has used this proceeding, and Captain Bushman's verified statement in particular, as a springboard to engage in an irrelevant side show of blame-shifting and character assassination, loaded with innuendo, false and misleading statements, and opinions presented as fact.⁶⁹ Fortunately, the vast majority of this unseemly nonsense is limited to the SRC Protest's verified statements of Mr. Williamson and Mr. Bickleman, and does not find its way into the pages of the SRC's 22-page legal

⁶⁹ Among those vilified in the verified statement screed appended to the SRC Protest are BCHS, the late George M. Hart (who supplied SRC with over \$350,000 to sustain the railroad during his leadership tenure, and who is not alive to defend himself against SRC's incorrect and disparaging statements), Captain Bushman, and John Willever (the executor of the Estate, who Mr. Williamson describes as "being set up to be the bad guy"). V.S. Williamson at 8.

argument.⁷⁰ The disconnect between the SRC Protest's legal argument and the verified statements (which are rarely, if ever, cross-referenced in the legal argument) is so striking that it appears that SRC's counsel purposely separated SRC's legal presentation from the ugly personal attacks in the verified statements that do little but show the SRC witnesses' true colors.

While an adverse abandonment is sure to strike nerves and stir emotions, the Board is entrusted with rising above the fray and focusing upon the issues that are truly of relevance to its PC&N determination. The Estate admittedly has taken the position that it is before the Board because SRC has not honored its debt obligations as a matter of law. In so doing, the Estate has posited that, in view of section 10101(9) of the RTP, SRC is not conducting its financial affairs in a manner consistent with a railroad that is honestly managed. The Estate has questioned SRC's priorities, but it has never impugned individuals among SRC's management, and it never once, contrary to SRC's claims, contested the railroading credentials, acumen, or ability of those currently leading SRC, although it very easily could have.

Responding to the numerous, and oftentimes egregious, false and misleading statements that are contained in (and limited to) the verified statements attached to the SRC Protest would be a lengthy and tiresome process. But in the end, such an effort is unnecessary. From the Estate's perspective, the extensive blame-shifting and character assassination contained in the SRC Protest verified statements was excluded from the main body of SRC's legal argument for good reason. It has no bearing on the merits of the subject adverse abandonment Application,

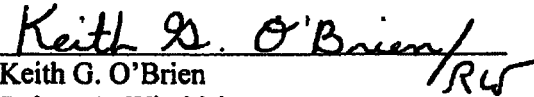
⁷⁰ For example, Mr. Williamson expends much energy in attacking Captain Bushman's motivation to involve himself in this proceeding. In taking swipes at Captain Bushman's personal integrity, he argues that Captain Bushman's verified statement be stricken from the record. Of course, this is merely a witness' opinion, not a direct request of the Board, and SRC's counsel possesses both the integrity and the better sense than to actually move to strike Captain Bushman's testimony.

and may have been employed by those involved as a means to divert the Board's attention from the facts and policy considerations that truly matter here.

III. CONCLUSION

In view of the facts and circumstances reflected in the record in this proceeding, the Estate respectfully requests that the Board find that the PC&N warrant removal of the agency's jurisdiction over the SRC Line so that the Estate may pursue its state law remedies against SRC. The Estate submits that favorable Board action on the Estate's Application may facilitate private, state, and/or local efforts pursuant to which SRC's assets may be sold at fair market value to an entity with sufficient funds to preserve the rail property for freight or excursion rail service.

Respectfully submitted,


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Dated: September 6, 2011

Attorneys for the Estate of George M. Hart

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing Rebuttal In Support of the Application of the Estate of George M. Hart for Abandonment of the Stewartstown Railroad Company to be served upon all parties of record by first class mail (postage prepaid) or by more expeditious means of delivery, and upon the five shippers who have in the past made use of the rail line that is the subject of this proceeding (to the extent that the shipper contact information is available).


Robert A. Wimbish

Dated: September 6, 2011

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.**

STB Docket No. AB-1071

**STEWARTSTOWN RAILROAD COMPANY
- ADVERSE ABANDONMENT -
IN YORK COUNTY, PA**

EXHIBIT A

STEWARTSTOWN RR 5-YEAR REPAYMENT PROPOSAL

Stewartstown Railroad Company

P.O. BOX 155

Stewartstown, Pennsylvania 17363

COPY

March 10, 2010

Mr. Douglas Dolan
Executive Director
Bucks County Historical Society

Dear Mr. Dolan,

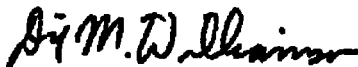
Upon careful consideration of the realities of today's economic environment the officials of the Stewartstown Railroad Company have determined they are able to commit to the following schedule for repayment of the lien to the George M. Hart estate.

The Company agrees to pay the lien in full in the amount of \$ 352, 415.00 over a period of five (5) years beginning April 2nd, 2010. An initial payment of \$ 25,000.00 will be made on or before April 2nd, 2011. Payments of \$ 50,000.00 each would be payable on or before April 2nd of 2012, 2013, and 2014. A final payment of \$ 177, 415.00 would be due on or before April 2nd 2015 at which time the lien would be considered to have been paid in full.

The Company expects to raise these funds from two primary sources. The first being revenues from excursions as incremental portions of the railroad are returned to service and the second being from a capital fundraising campaign presently under development by the Friends of the Stewartstown Railroad, Inc, a 501 (c) (3) non-profit corporation.

Additionally, Company officials will continue the ongoing search for a buyer for the railroad property which would allow sufficient funds for an immediate full repayment of the lien.

Regards, -



David M. Williamson
President



D. Renee Bitten
Secretary